

## ARKANSAS COURT OF APPEALS

DIVISION IV  
No. CA08-018

JIM AND TERRY DAVIS  
APPELLANTS

V.

WILLIAM AND DEBORAH BADLEY  
and LARRY CARTER D/B/A  
CARTER REALTY

APPELLEES

**Opinion Delivered** November 5, 2008

APPEAL FROM THE RANDOLPH  
COUNTY CIRCUIT COURT,  
[NO. CV2004-146]

HONORABLE HAROLD S. ERWIN,  
JUDGE

AFFIRMED

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**SARAH J. HEFFLEY, Judge**

Appellants Terry and Jim Davis bring this appeal from the order of the Randolph County Circuit Court granting summary judgment on their tort and breach-of-contract claims stemming from their purchase of a house. The Davises argue that there are material issues of fact to be determined so as to preclude summary judgment. We disagree and affirm.

In April 2001, the Davises and appellees William and Deborah Badley entered into a contract whereby the Davises would purchase the Badleys' home in Randolph County. Appellee Larry Carter, doing business as Carter Realty, acted as real estate agent for both parties. Paragraph 15 of the contract states that the Davises agreed to accept the property "as is," providing only that certain specified electrical, plumbing, heating and air-conditioning appliances and other mechanical devices be in normal working order. Paragraph 16 is a multiple-option paragraph that relates to the seller's property disclosure. The option checked

in this contract provided that a disclosure form had already been delivered to the Davises and that the answers were true, correct, and complete. Paragraph 16 also set out that the delivery of the disclosure form neither limited nor restricted the Buyer's Disclaimer of Reliance contained in Paragraph 25. The disclosure document mentioned in paragraph 16 was not provided to the Davises. Nevertheless, the transaction closed in June 2001. In October 2001, the Davises moved out of the home. At times, they had shut off the electricity to the home. A few weeks later, they returned to find water in the basement.

On October 18, 2004, the Davises filed suit against the Badleys and Carter. The Davises alleged causes of action for fraud, constructive fraud, breach of fiduciary duty, and fraud in the inducement. Specifically, the complaint alleged that the failure to provide the disclosure form amounted to fraud or constructive fraud. The complaint also alleged that Carter had made false representations to the Davises that the home was free of latent defects and that the Davises would receive a disclosure form verifying the absence of such defects. The Badleys and Carter each denied the material allegations of the complaint and raised the statute of limitations and waiver as affirmative defenses.

On August 29, 2006, Carter filed a motion for summary judgment, asserting that the three-year statute of limitations had expired prior to the Davises' complaint being filed. The motion also asserted that the Davises were unable to establish any of the elements of their claim. The Badleys filed their own motion for summary judgment and incorporated Carter's motion and brief.

Supporting the motions for summary judgment were excerpts from several depositions. In his deposition, William Badley testified that there were obvious watermarks on the

basement walls when he purchased the property in 1990. Badley said that he did not repaint the basement or replace the basement floor during his ownership. He also said that the house did not flood if the sump pumps were properly working. He added that the house flooded twice during his ownership, when the sump pumps were not working. Badley said that he did not recall completing a disclosure form. He also stated that he never met or discussed the property with the Davises. He indicated that he told Stanley Camp, the real estate agent involved in this transaction, about the sump pumps and the basement flooding on two occasions. Finally, Badley stated that, if he had completed a disclosure form, he would have answered “yes” to questions asking whether there had been water intrusions or whether there had been any problems with any private sewer or water system, septic system, or water well or other system utility servicing the property. The testimony of William Badley’s wife, Deborah, was consistent with his testimony.

Jim Davis testified by deposition that Stanley Camp showed him the house while Deborah Badley was present. He said that he did not discuss the house with Ms. Badley. During the tour, Davis said that he and Camp went into the basement but that he did not notice the watermarks on the walls. He also said that he did not discuss whether there were water issues in the basement with Camp. Davis admitted that he had not received the disclosure form when he signed the contract or at closing. He also could not recall whether he and Camp discussed the disclosure form or for Camp to provide it to him.

When asked what was the fraudulent act the Badleys committed, Davis responded that it was the failure to provide a disclosure form indicating the basement water problems. He acknowledged that Larry Carter did not personally make any misrepresentations. Instead, he

was relying on misrepresentations made by Stanley Camp. However, when asked, he could not recall any specific statement Camp made that the house was free of any kind of latent defect. Davis said that Camp specifically told him when he signed the contract that he would receive a completed disclosure form verifying the absence of defects prior to the closing. Davis later testified that Camp never actually said that the disclosure would verify the absence of defects.

In her deposition, Terry Davis testified that she noticed a watermark on the wall when she was touring the house with Stanley Camp. Davis did not recall whether she specifically asked Camp about the mark. She also did not recall whether Camp provided any information about water in the basement. She said that she had no other discussions with Camp about the house.

Stanley Camp testified that the disclosure statement was not required by the Arkansas Real Estate Commission when the Davises bought the house in 2001. He could not recall whether the Badleys completed a disclosure form, adding that, in some transactions, they were not completed. Camp did not recall seeing any evidence of flooding in the basement when he toured the house with Jim Davis. He also said that the Badleys never advised him that there had been flooding in the basement and that this was something he would have asked them about. He added that he did not discuss any leaks with Jim Davis because there was no evidence of leaks in the basement. He also said that there were boxes stacked along the walls of the basement when he and Jim Davis toured the house. Camp admitted that it was important for him to know whether there had been flooding in the basement because that should be disclosed to the purchasers. Camp also said that he did not remember making any

statements to Davis about providing the disclosure form prior to closing.

Larry Carter testified that his records of the transaction at issue did not include a disclosure form but that one was not required at the time. He said that Stanley Camp was an independent contractor. He also said that other sales handled by Camp in 2001 contained disclosure forms but that Camp could not explain why one was not completed in this transaction.

After a hearing, the circuit court took the motions under advisement. On October 18, 2007, the circuit court entered its order finding that there were no genuine issues of material fact and that the case could be decided as a matter of law. The court granted summary judgment to both Carter and the Badleys without further elaboration. This appeal followed.

Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Davis v. Parham*, 362 Ark. 352, 208 S.W.3d 162 (2005). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appeal, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* We view the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.*

When the running of the statute of limitations is raised as a defense, the defendant has the burden of affirmatively pleading this defense. *Meadors v. Still*, 344 Ark. 307, 40 S.W.3d 294 (2001). However, once it is clear from the face of the complaint that the action is barred

by the applicable limitations period, the burden shifts to the plaintiff to prove by a preponderance of the evidence that the statute of limitations was in fact tolled. *Id.*; *Technology Partners, Inc. v. Regions Bank*, 97 Ark. App. 229, 245 S.W.3d 687 (2006).

The statute of limitations for fraud, negligence, and all tort actions not otherwise limited by law, is three years. Ark. Code Ann. § 16-56-105; *Gibson v. Herring*, 63 Ark. App. 155, 975 S.W.2d 860 (1998). The limitations period begins to run, in the absence of fraudulent concealment of the wrong, when the wrong occurs, not when it is discovered. *Gibson, supra*. Fraudulent concealment, however, suspends the running of the statute of limitations, and the suspension remains in effect until the party having the cause of action discovers the fraud or should have discovered it. *Delanno, Inc. v. Peace*, 366 Ark. 542, 545, 237 S.W.3d 81, 84 (2006). In order to toll the statute of limitations, the fraud perpetrated must be concealed. *Id.* The general rule of fraudulent concealment requires “some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff’s cause of action concealed, or perpetrated in a way that conceals itself.” *Id.* (quoting *Sheton v. Fiser*, 340 Ark. 89, 96, 8 S.W.3d 557, 562 (2000)).

Here, the real estate contract was executed on April 20, 2001. The Davises allege that the fraud occurred when the disclosure form was not provided at that time. Therefore, the Davises’ causes of action for fraud, constructive fraud, breach of fiduciary duty, and fraud in the inducement accrued at the time of sale and the statute of limitations commenced to run. The Davises did not file suit until October 18, 2004, more than three years later. Therefore, unless there was some concealment of the fraud, the statute of limitations bars the Davises’ action.

In the present case, we cannot say that there was any concealment. The Davises allege that the fraudulent concealment was the failure to provide the disclosure form in the first instance. There must be something more than nondisclosure, or a continuation of that nondisclosure, to toll the limitations period. *Davis, supra; Technology Partners, supra*. The Davises do not point to any evidence other than the continued nondisclosure in order to argue that the statute of limitations was tolled. They knew at the time that they executed the real estate contract that they were entitled to the disclosure form. They also knew at that time that they did not have the statement. They also knew that they had a right to inspect the property to determine if there were any defects and chose not to have an inspection. Under these circumstances, they are presumed to have had reasonable knowledge of any defect. *O'Mara v. Dykema*, 328 Ark. 310, 942 S.W.2d 854 (1997). Because the Davises failed to meet their burden to show *facts* to constitute fraudulent concealment, summary judgment was appropriate. *Davis, supra*.

We now turn to the Davises' claim for breach of contract. Both Carter and the Badleys assert that the Davises did not plead a breach-of-contract claim. We need not decide whether the complaint states a cause of action for breach because the circuit court correctly granted summary judgment to the Badleys and Carter. Arkansas courts have held that a party may waive a breach of contract by the other side when, with knowledge of a breach by the other party, he allows the other party to continue in performance of the contract. *Grayson-McLeod Lumber Co. v. Slack-Kress Tie & Stave Co.*, 102 Ark. 79, 143 S.W. 581 (1912); *Stephens v. West Pontiac-GMC, Inc.*, 7 Ark. App. 275, 647 S.W.2d 492 (1983). Jim Davis testified that he was aware that the disclosure form had not been provided at the time that he executed the

contract. He also knew that the disclosure had not been provided at the time the transaction closed. Ordinarily, the issue of waiver is one of fact. *Bright v. Gass*, 38 Ark. App. 71, 831 S.W.2d 149 (1992). However, given Jim Davis's testimony, there is only one conclusion to be drawn: that the Davises waived the right to complain about the failure to provide the disclosure form. Therefore, summary judgment was appropriate. *See Lewis v. Crelia*, 365 Ark. 330, 229 S.W.3d 19 (2006).

Affirmed.

HART and GLADWIN, JJ., agree.